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No. 82

In the Supreme Court of the United States

OCTOBER TERM, 1932

FRANK COOK, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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OPINIONS BELOW

The opinion of the District Court (R. 64–83) is reported in 51 F. (2d) 292. That of the Circuit Court of Appeals (R. 103–114) is reported in 56 F. (2d) 921.

JURISDICTION

The final decree of the Circuit Court of Appeals (R. 114) was entered March 18, 1932. The petition for a writ of certiorari was filed May 16, 1932. While petitioner does not so state, presumably he invokes the jurisdiction of this Court under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The principal questions presented are:

1. Whether libels in admiralty under Section 584 of the Tariff Act of 1930 may be sustained against a British vessel and her cargo of intoxicating liquors, seized by officers of the Coast Guard within four leagues of the coast, although not within one hour's sailing distance therefrom.

2. Assuming that such seizure is irregular, under the Treaty of 1924 with Great Britain, does a claimant of the vessel and its cargo waive the irregularity by filing answers to the libels?

STATUTORY AND TREATY PROVISIONS INVOLVED

The pertinent provisions of the Tariff Act of 1930 and of the Treaty of 1924 with Great Britain are printed in the Appendix (*infra,* pp. 8–13).

STATEMENT

Two libels of information in admiralty were filed by the United States in the District Court for Rhode Island. The first was directed against the British Motor Screw "Mazel Tov" and sought the collection out of the vessel, under Section 594 of the Tariff Act of 1930 (*infra,* p. 11), of certain penalties alleged to have been incurred by its master. This libel contained three counts. (R. 2–7.) The first alleged that the master failed to produce a manifest of his cargo; the second that he had on board unmanifested cargo; and the third that his vessel arrived within the limits of a customs col-

lection district and attempted to depart therefrom without making entry. The first two counts were based upon Section 584 of the Tariff Act of 1930 and the third upon Section 585 of that Act.

The second libel (R. 7–10) sought the forfeiture, under Section 584 of the Tariff Act of 1930, of the cargo of the "Mazel Tov" on the ground that it contained unmanifested cargo consigned to the master of the vessel.

The petitioner herein claimed both the ship and the cargo, intervening in the ship libel as master and bailee (R. 14), and in the cargo libel as consignee (R. 17). He then filed answers to both libels on the merits and in such answers excepted to the court's jurisdiction on the ground that the ship was "captured and boarded at a point more than four (4) leagues from the coast of the United States." (R. 14–18.)

From the facts found by the District Court, as contained in its opinion and in separate findings of fact (R. 64 *et seq.*, 89, 94), it appears that on the evening of November 1, 1930, the "Mazel Tov," a vessel of British registry, was boarded by officers of the Coast Guard off the coast of Massachusetts 11½ miles from the nearest point of land. The officers found on board unmanifested merchandise consisting of a large quantity of foreign intoxicating liquors which had been cleared at St. Pierre. It was intended that these liquors should be transshipped to contact boats and landed in the United

States. The speed of the "Mazel Tov" was between nine and ten knots an hour and was insufficient to propel her to the shores of the United States within an hour's sailing time.

The two libels were heard together. After the taking of testimony, they were dismissed by the District Court (R. 83, 85) on the ground that the vessel was seized in violation of the Treaty of 1924 with Great Britain, which provides in Section 3 of Article II that the right of boarding British vessels suspected of liquor smuggling—

> shall not be exercised at a greater distance from the coast of the United States its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense.

The view of the court as to the effect of the treaty was (R. 69) that—

> it dealt completely with the subject of the limits within which search and seizure of British vessels could be made in the enforcement and application of our laws for the prevention of the importation or smuggling of liquor, and that the treaty excludes all extra-territorial seizures (that is beyond the three-mile limit), not made in conformity with the terms of the treaty.

Upon appeal by the United States the Circuit Court of Appeals reversed the decree of the District Court and sustained the second count of the libel seeking collection out of the ship of the penalty for

having unmanifested cargo, and the single count of the libel seeking forfeiture of the cargo, both of which counts were based upon Section 584 of the Tariff Act (*infra*, pp. 9–10). No question was raised by the United States in that court in respect of the count charging failure to produce a manifest, and the United States has not sought review of the adverse decision of the Circuit Court of Appeals with reference to the count asserting a penalty against the vessel for departing from a collection district without making entry.

The Circuit Court of Appeals held, as to the validity of the seizure of the vessel, that the Treaty did not in any way modify or abrogate the provisions of Section 581 of the Tariff Act of 1930 (*infra*, p. 8) authorizing Coast Guard and other officers of the United States to board any vessel "within four leagues of the coast of the United States" for the purpose of examining its manifest and ascertaining whether the vessel or its merchandise is subject to forfeiture for having violated the laws of the United States.

REASONS FOR NOT OPPOSING THE PETITION

As was pointed out by the District Court in its opinion (R. 68–72), there are divergent views in the lower Federal courts as to the effect of the Treaty with Great Britain upon the search and seizure provisions of the Tariff Act of 1930 and of its predecessor, the Tariff Act of 1922. The de-

sirability of removing this difference of opinion and of establishing a rule for the guidance of the administrative officers of the Government is evident, and we therefore do not oppose the granting of the petition. Nevertheless, we desire to call the attention of the Court to certain difficulties which may stand in the way of a decision of the question.

First, the petition and supporting brief do not comply with the rules of this Court in that they contain no reference to the statutory provision relied upon to support this Court's jurisdiction, no assignment of errors, and no reasons, as such, for the allowance of the writ. (Rules 12, 27, 38, par. 2.)

The second difficulty is that there is serious doubt whether the question as to the effect of the Treaty is presented by the record. In proceedings for forfeiture of property seized within the maritime jurisdiction, it may at least be said that the question of the validity of the seizure must be raised by a preliminary and special plea to the jurisdiction, and that the point is waived where it is not raised prior to the filing of an answer upon the merits. *The Abby,* Fed. Cas. No. 14 (C. C. Mass.); *The Rosalie M.,* 12 F. (2d) 970 (C. C. A. 5th), citing *The Merino,* 9 Wheat. 391, *The Richmond,* 9 Cranch 102, and *In re Johnson,* 167 U. S. 120. See also *Ford* v. *United States,* 273 U. S. 593, 606; *Dodge* v. *United States,* 272 U. S. 530, 532; *Sheppard* v. *Graves,* 14 How. 504; *The Underwriter,*

13 F. (2d) 433, 434 (C. C. A. 2d), affirmed *sub nom. Maul* v. *United States,* 274 U. S. 501.

In the instant case the claimant did not raise the question of the validity of the seizure under the Treaty by a preliminary plea. On the contrary, he filed complete answers to both libels on the merits. His so-called exceptions to the jurisdiction of the court were set forth in his answers, and did not claim any violation of Treaty rights, but merely alleged that the boarding of the vessel occurred more than four leagues from the coast of the United States, a reference obviously to the search and seizure provisions of the Tariff Act.

Respectfully submitted.

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APPENDIX

The pertinent provisions of the Tariff Act of 1930, c. 497, 46 Stat. 590, 747, 748, 751, are as follows:

SEC. 581. BOARDING VESSELS [U. S. C. SUP. V, TITLE 19, SEC. 1581.]

Officers of the customs or of the Coast Guard, and agents or other persons authorized by the Secretary of the Treasury, or appointed for that purpose in writing by a collector may at any time go on board of any vessel or vehicle at any place in the United States or within four leagues of the coast of the United States, without as well as within their respective districts, to examine the manifest and to inspect, search, and examine the vessel or vehicle, and every part thereof, and any person, trunk, or package on board, and to this end to hail and stop such vessel or vehicle, if under way, and use all necessary force to compel compliance, and if it shall appear that any breach or violation of the laws of the United States has been committed, whereby or in consequence of which such vessel or vehicle, or the merchandise, or any part thereof, on board of or imported by such vessel or vehicle is liable to forfeiture, it shall be the duty of such officer to make seizure of the same, and to arrest, or, in case of escape or attempted escape, to pursue and arrest any person engaged in such breach or violation.

Officers of the Department of Commerce and other persons authorized by such department may go on board of any vessel at any place in the United States or within four leagues of the coast of the United States and hail, stop, and board such vessels in the enforcement of the navigation laws and arrest or, in case of escape or attempted escape, pursue and arrest any person engaged in the breach or violation of the navigation laws.

* * * * *

SEC. 584. FALSITY OR LACK OF MANIFEST—[U. S. C. SUP. V, TITLE 19, SEC. 1584.]

Any master of any vessel and any person in charge of any vehicle bound to the United States who does not produce the manifest to the officer demanding the same shall be liable to a penalty of $500, and if any merchandise, including sea stores, is found on board of or after having been unladen from such vessel or vehicle which is not included or described in said manifest or does not agree therewith, the master of such vessel or the person in charge of such vehicle or the owner of such vessel or vehicle shall be liable to a penalty equal to the value of the merchandise so found or unladen, and any such merchandise belonging or consigned to the master or other officer or to any of the crew of such vessel, or to the owner or person in charge of such vehicle, shall be subject to forfeiture, and if any merchandise described in such manifest is not found on board the vessel or vehicle the master or other person in charge or the owner of such vessel or vehicle shall be subject to a penalty of $500: *Provided,* That if the collector shall be satisfied that the manifest was lost or mis-

laid without intentional fraud, or was defaced by accident, or is incorrect by reason of clerical error or other mistake and that no part of the merchandise not found on board was unshipped or discharged except as specified in the report of the master, said penalties shall not be incurred.

If any of such merchandise so found consists of smoking opium or opium prepared for smoking, the master of such vessel or the person in charge of such vehicle or the owner of such vessel or vehicle shall be liable to a penalty of $25 for each ounce thereof so found. Such penalty shall, notwithstanding the proviso in section 594 of this Act (relating to the immunity of vessels or vehicles used as common carriers), constitute a lien upon such vessel which may be enforced by a libel in rem; except that the master or owner of a vessel used by any person as a common carrier in the transaction of business as such common carrier shall not be liable to such penalty and the vessel shall not be held subject to the lien, if it appears to the satisfaction of the court that neither the master nor any of the officers (including licensed and unlicensed officers and petty officers) nor the owner of the vessel knew, and could not, by the exercise of the highest degree of care and diligence, have known, that such smoking opium or opium prepared for smoking was on board. Clearance of any such vessel may be withheld until such penalty is paid or until a bond, satisfactory to the collector, is given for the payment thereof. The provisions of this paragraph shall not prevent the forfeiture of any such vessel or vehicle under any other provision of law.

SEC. 594. LIBEL OF VESSELS AND VEHICLES. [U. S. C. SUP. V, TITLE 19, SEC. 1594.]

Whenever a vessel or vehicle, or the owner or master, conductor, driver, or other person in charge thereof, has become subject to a penalty for violation of the customs-revenue laws of the United States, such vessel or vehicle shall be held for the payment of such penalty and may be seized and proceeded against summarily by libel to recover the same: *Provided,* That no vessel or vehicle used by any person as a common carrier in the transaction of business as such common carrier shall be so held or subject to seizure or forfeiture under the customs laws, unless it shall appear that the owner or master of such vessel or the conductor, driver, or other person in charge of such vehicle was at the time of the alleged illegal act a consenting party or privy thereto.

The Treaty with Great Britain dated May 22, 1924 (43 Stat. 1761), Article II, contains the following provisions:

(1) His Brittanic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavoring to import or have imported alcoholic beverages into the United States, its territories or possessions in violation of the laws there in force. When such enquiries and examina-

tion show a reasonable ground for suspicion, a search of the vessel may be instituted.

(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offense against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States its territories or possessions than can be traversed in one hour by the vessel suspected of endeavoring to commit the offense. In cases, however, in which the liquor is intended to be conveyed to the United States its territories or possessions by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised.

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